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In the Supreme Court

OF THE

United States

No. 631

OCTOBER TERM, 1949

RUTH M. MORAIRTY
Petitioner,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the 9th Circuit, entered in the above entitled cause (R. 313), and the opinion filed therein (R. 301) reversing the judg-

ment upon the verdict by the District Court of the United States for the District of Arizona (R. 57).

OPINIONS BELOW.

The verdict of the jury and judgment of the District Court entered thereon (R. 57) and the opinion and judgment of the Court of Appeals are set forth in the record at pages 301 to 313.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 13, 1949, the time for filing petition for rehearing was enlarged to the 23rd day of January, 1950, and the petition for rehearing was filed on the 20th day of January, 1950, and said petition was denied on the 23rd day of January, 1950. Jurisdiction of this court is invoked under sections 1254, and 2101 of the Judicial Code (Act of June 25, 1948, U. S. C. 1254, 2101).

STATUTES INVOLVED.

The statute involved is set forth in this petition and is:

Arizona Code Annotated,1939 par. 61-704, (3).

STATEMENT OF THE CASE.

The questions here involved are as follows:

1. The interpretation of the Insurance Statute of State of Arizona as the same applies to applications for life insurance.

2. The decisions of the Supreme Court of the State of Arizona on what constitutes fraud, in an application for insurance.

3. The interpretation given the said statute and decisions of the Supreme Court of the State of Arizona by the United States Court of Appeals for the 9th circuit.

4. The conflict between the instant decision and prior decisions of the Court of Appeals for the 9th Circuit in similar cases.

5. The conflict between the instant decisions and decisions of other Circuit Courts of Appeal in like cases.

6. The conflict between the instant decisions and decisions of this court in cases of similar facts and questions of law.

7. The failure of the Court of Appeals to consider the uncontradicted evidence of the insurance companies' knowledge regarding all of the facts alleged to have been concealed before the policy was issued, contrary to the adjudicated cases in Arizona, and other jurisdictions.

The applicable statute of the State of Arizona provides that:

"The policy constitutes the entire contract be-

> tween the parties, and is incontestible after not more than two (2) years from its date . . .; that all statements made by the insured shall, in the absence of fraud, be deemed representation and not warrantees . . ." Ariz. Code Annotated, 1939, par. 61-704 (3).

The Supreme Court of Arizona has defined "Legal Fraud" in the case of Illinois Bankers Life Ass'n. vs Theodore, 44 Ariz. 160 34 P. 2d 423

and held that the same, under proper instructions, was a question of fact for the jury.

The United States Court for the District of Arizona submitted the question of fraud under the rule of said case to the jury with an instruction embodying the exact words of the Supreme Court, as the proper instruction required thereunder.

The opinion and judgment of the Court of Appeals has contradicted the meaning and intent of the Arizona statute, aforesaid, and the decisions of the Supreme Court of the State of Arizona thereon, and the decisions of the 9th Circuit Court of Appeals on cases of like facts and law, as well as the decisions of the other circuit courts, and the decisions of this court.

Upon suit being filed by the petitioner in the state courts, the respondent caused the same to be removed to the Federal District Court, and, having admitted the issuance of the policy, the payment of premiums, the death of the insured, and proper notice and demand upon it by the beneficiary, the petitioner herein, the respondent pleaded that the insured had "fraudulently an with intent to deceive the company" concealed

certain facts pertaining to his medical history prior to his application for the insurance in question.

The trial judge found a conflict in the evidence upon the question raised by the affirmative defense of the respondent, and submitted the case to the jury on the issue raised and instructed the jury in the manner required by the Arizona decision. The jury returned a verdict for this petitioner and judgment was entered thereon. The respondent appealed to the United States Court of Appeals of the 9th Circuit, upon the grounds that under its pleadings and proof it was entitled to a directed verdict.

On the appeal, and more particularly, in the argument before the Court of Appeals, the respondent, for the first time, advanced the theory as a defense, that the insured had advised the company, in his application, that he was suffering from "Diverticuli" but his failure to disclose in detail every attack and treatment of said ailment constituted such concealment of a material fact as to entitle the respondent to a directed verdict. The case had been tried, on the part of the respondent, in the lower court upon the allegations in the affirmative defense that the insured had concealed the fact that he had suffered and had been treated for an ulcer of the stomach or duodenum.

The Legislature of the State of Arizona has used the word, "Fraud" without qualification. The Supreme Court of Arizona, in recent decisions, has defined the meaning of the word "fraud" both legally and actually, in such a way as to make it depend upon the facts in the case; therefore, a question of fact for the jury.

The 9th Circuit Court of Appeals in its decisions in like cases, has laid down the rule that misrepresentations, in order to avoid a policy of insurance, must be material, and must be proven to be material. This rule is followed by other circuit courts of appeal and is the rule of this court.

The Court of Appeals for the 9th Circuit holds that a false representation is material as a matter of law, regardless of the facts, even though the trial court held that there was a question of fact and submitted the question to the jury under proper instructions and the jury found the facts in favor of the plaintiff.

On December 13, 1949 the Circuit Court of Appeals rendered its opinion (R. 303) and on the same day entered judgment (R. 304-313) reversing the judgment of the lower court, and ordering that judgment be entered for the defendant in the District Court (R. 303). The time for filing, petition for rehearing, was, on due request, extended to January 23, 1950 (R. 315) and said petition was filed on January 20, 1950 and denied on January 23, 1950 (R. 315).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the 9th Circuit erred:

1. In holding that under the Arizona Insurance Statute and the decisions of the Supreme Court of Arizona that a false representation is material as a matter of law, and voids the policy.

2. In holding that an alleged false representation was material as a matter of law, when, under all of the facts in the case, there was a question as to whether

the facts were material, and said question had been submitted to the jury under proper instructions.

3. In holding that the Supreme Court of Arizona had, by its decisions, held that a false representation was material as a matter of law and entitled the defendant to a directed verdict.

4. In ignoring the facts proven concerning the alleged material misrepresentation, and the rule of the law in Arizona that under such situation the question of materiality should be submitted to the jury under proper instructions.

5. In ruling that materiality of alleged false representation is not a question for the jury, in direct conflict with other decisions of the Court of Appeals for the 9th Circuit.

6. In ruling that the materiality of an alleged misrepresentation is not a question for the jury.

7. In ruling, contrary to the rule of this court, as to the interpretation of statutes, the decisions of the State Supreme Court involved, and the rule governing the meaning of the word "Fraud" as defined in the decisions of the state in which the case arose.

8. In refusing to consider the uncontradicted evidence that the company made an investigation and had knowledge of all of the facts allegedly concealed, before it issued the policy of insurance. In remanding the cause with instructions to enter judgment in favor of the applicant, thereby denying to petitioner a new trial.

REASONS FOR GRANTING THE WRIT.

INTRODUCTION.

The rule of the Supreme Court of the State of Arizona is that if the insured in making application for insurance, makes a false representation of material fact and the facts are presumable within the knowledge of the applicant, and are such that the insured would naturally have contemplated that his answers represented the actual facts (legal fraud) the policy is *voidable*; but the question of the materiality and effect on the insurer is a question of fact to be submitted to the jury, under proper instructions (Illinois Bankers Life Ass'n. vs. Theodore, 44 Ariz. 160, 34 P. 2d. 423. (See 44 Ariz. 314, 55 P. 2d. 806). There is nowhere, in the rule laid down, in the foregoing, or later cases that such false representation *voids* the policy; however, since the Theodore case was decided in 1934 the Supreme Court of Arizona has modified the rule in that case, and at the inception of this case, the Legal Fraud set forth in the Theodore case was confined to fraud arising out of fiduciary relations. In re McDonnell's Estate, 179 P. 2d. 238, 65 Ariz. 248.

The District Court followed the Arizona rule and submitted the question of fraud, to the jury under the instruction required by the Theodore, and later cases, but the Circuit Court held that any representation proven to be false was material, even where, as in this case, the representation itself raised a question as to its materiality to the risk assumed by the insurer.

The rule laid down by the Supreme Court of Arizona is that, if a false representation is made, and the

one to whom it is made does not rely on it, but makes an independent investigation and knows, or could have discovered, that the representation was false, and then issues the insurance, or goes ahead with the contract, he cannot rescind the same.

Greiber vs. Equitable Life Assurance Society of the United States, 43 Ariz. 1, 28 P. 2d. 817;

In re McDonnell's Estate, Supra.

The Circuit Court of Appeals ignored the foregoing rule, though, the uncontradicted affirmative and circumstantial evidence in the case raised the unescapable conclusion that the insurer had knowledge of what it now alleges misrepresentation by the insured, before it issued to him its policy of insurance.

The rule of the Court of Appeals for the 9th Circuit is that a false representation must be of a material fact before it can effect the insurer's liability on the policy, and the question of materiality is always one for the jury. *Northwestern Life Insurance vs. King, 53 Fed. 2d. 613.* And all other Circuit Courts of Appeal hold to the same rule, yet, in the instant case the Circuit Court of Appeals set aside the verdict of the jury and reversed the judgment entered thereon upon the theory that a false representation having been made it was material as a matter of law and voided the policy. The Court did not consider or discuss the question of whether there was a conflict, however slight, in the evidence as to the materiality of the statements, but held that the false statement alone was sufficient for reversal.

The foregoing questions concerned the proper construction of the rule governing representations made in an insurance policy, is of general important interest to all people in all parts of the Country, and its proper safe guards and requirements for the insured as well as the insurer is a matter entering the daily life of every home in the United States.

1. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

The Circuit Court in reaching its decision to set aside the verdict and judgment in the lower court, has reversed the Supreme Court of the State of Arizona, in that it has held that Respondent had, under the applicable law of Arizona, established a defense, (that insured made misrepresentations of a material fact in his application) as a matter of law. The Court of Appeals has based its decision on the case of Illinois Bankers Life Ass'n. v. Theodore, 44 Ariz. 160, 34 P. 2d 423 (see Ill. Bankers Life Ass'n. v. Theodore, 47 Ariz. 314, 55 P. 2d 806). The foregoing case holds that a false representation in an application for insurance will not make *Voidable* a policy for insurance unless the insured has been guilty of *legal* or actual fraud in making such representation, and defines *legal fraud* as a fraud without intent to deceive, and makes this specie of fraud a jury question, in the following words: *"But that where the question is of such nature that a reasonable man would know it represented merely the opinion of the insured, there must be an actual intent to deceive"*. In reversing the lower court, the Supreme Court of Arizona, in the Theodore case, sent the case back for a new trial because the court had failed to instruct in accordance with its decision, (supra).

The Supreme Courts of Arizona have always held that fraud is a question for the Jury, and especially the peculiar specie of legal fraud.

The opinion of the Circuit Court held as follows:

> "The principal question before us is whether or not, under the applicable Arizona law, applicant had established the defense (that the insured made a representation of a material fact in his application) as a matter of law, and was therefore entitled to a directed verdict or a judgment notwithstanding the verdict."

"We are persuaded that the question must be answered in the affirmative."

The Circuit Court held that under the case of the Illinois Bankers Life Ass'n. vs. Theodore it was not necessary to show actual fraud or intent to deceive in order to make such an insurance policy voidable. The Court of Appeals further assumed that the alleged false statements were material. The Trial Court found that there was a question as to materiality of the representations.

The Supreme Court of Arizona in the Theodore case Supra, did not hold that the alleged "Legal Fraud" voided the policy; on the contrary, it held that where legal fraud appeared, the question of fact raised thereunder should be submitted to the jury under proper instructions.

The Theodore case was decided in 1934. Since that time, the Supreme Court of Arizona has modified its construction as to what constitutes "Legal Fraud" and the present rule in Arizona is as follows:

"Fraud is generally classified under two major headings: actual and constructive. The former is distinguished by an actual intent to deceive while the latter is characterized by a breach of duty, acceptable at law, irrespective of lawless guilt, and arising out of a fiduciary or confidential relationship." 37 C. J. S. Fraud, par. 2, pages 208-215."

"It is true that a greater degree of proof of fraud is required between parties dealing at arms length than if a confidential or fiduciary relationship exists. Waddell vs. White, 56 Ariz. 420, 108 Pac. 2nd. 565,, rehearing denied 56 Ariz. 525, 109 Pac. 2nd. 843. 37 C. J. S. Fraud, par. 2, at page 213. But neither the fact of tenancy in common as to the ownership of real estate between the parties nor any other circumstance here present supports the view that in fact a fiduciary relation did exist. 62 C. J. 419, section 23."

"* * * * to establish a fiduciary relationship, on a violation of which fraud is sought to be based, there must be something approximating business agency, professional relationship, or family tie impelling or inducing the trusting party to relax the care and vigilance he would ordinarily exercise."

"* * * * * a confidential relation * * * * * is a relation of parties in which one is bound to act for the benefit of the other and can take no advantage to himself from his acts relating to the interest of another * * * * * * it is denied that * * * * * * mere confidence or implicit faith in another's honesty and integ-

rity is sufficient to constitute a fiduciary or confidential relationship. So, too, mere friendly relations are insufficient for the purpose."

"Fraud may never be established by doubtful, vague, speculative or inconclusive evidence, and always the proof must be sufficient to overcome the initial presumption in favor of honesty. Citing C. J. S. supra. Each and all of the required elements of fraud must be proved."

In Re McDonnell's Estate, 179 Pac. 2nd. 238. Decided April 7th, 1947.

Brazee vs. Morris, 204 Pac. 2nd. 475.

This Court has held in cases involving fraud that it is generally a question for the jury where a false representation is charged and the question arises as to whether the false representation is material to the fraud charged.

Equitable Life Ins. Co. of Iowa vs. Halsey Stuart & Co., 312 U. S. 410, 61 Sup. Ct. Rep. 623.

From earliest times this Court has held that keeping silent on a matter, or withholding a fact intentionally amounts to a false representation if *material*, but that the question of whether or not it is material is always a question for the jury.

Stewart vs. Wyoming Cattle Ranch Co. Ltd., 9 Sup. Ct. Rep. 101-128 U. S. 383.

Where the question of whether false representations had been made thru personal knowledge or opinion, it

was a matter for the jury to decide upon all the facts under proper instructions as to what constituted fraud.

Moulor vs. American Life Ins. Co.,
111 U. S. 335.

No where in the decisions of this Court can we find a rule to the effect that a false statement regarding facts presumably or actually within the knowledge of the party making the statement, regardless of whether they are material, are material as a matter of law.

This Court has not applied that rule in any case, and the disposition of the Theodore case supra, by the Supreme Court of Arizona, was that the question of "legal" fraud was one for the jury under proper instructions.

Another conflict in the question and manner of procedure that appears in the decision of the Circuit Court of Appeals in this case is that the Circuit Court of Appeals permitted the respondent to present a theory of the case for the first time in its argument before the Circuit Court of Appeals, which was directly contrary to the rule of procedure followed by the Supreme Court of the State of Arizona.

The case in the Trial Court was based on the allegations in the affirmative defense of the respondent that the insured concealed the fact that he was suffering from a stomach or duodenal ulcer. The whole case proceeded on that theory. When the petitioner attempted to show the circumstances surrounding the diverticuli which insured told the company he had, such evidence was strenuously objected to by respondent. The assignments of error and the arguments in

the briefs of the respondent were based on the ulcer theory.

In the argument before the Circuit Court of Appeals the question of the insured's treatment for diverticuli was raised for the first time.

The rule in Arizona is that the Supreme Court will not consider any matter not presented to the court below or brought before it in accordance with the Arizona rules of procedure.

> "The right of applicant to recover taxes subsequent to the tax sale to the state *was not made an issue in the lower court and hence is not before us on this appeal.*"
>
> Filer vs. Maricopa County, 198 Pac. 2d 131; Clark vs. Ellsworth, 184 Pac. 2d 821 and cases cited.

The Arizona statute governing insurance provides specifically that all statements made by the insured, shall, *in the absence of fraud* be deemed representations and not warranties.

> Ariz. Code Annotated 1939, par. 61-704(3).

The first time that the question of construing the word "fraud" as set forth in the insurance statute came before the Supreme Court of Arizona was in the year 1934, and at that time the Court adopted a definition of fraud in insurance cases. In the case of the Illinois Bankers Life Assurance Company vs. Theodore, 44 Ariz. 160, 34 Pac. 2d. 423, the Court stated what was "Legal Fraud." After stating what the law constituted as Legal Fraud, the Court went on to apply

that rule in the Theodore case by stating that where there was a question of false representation and its materiality to the risk involved, the question should be submitted to the jury under a proper instruction setting forth its definition of Legal Fraud.

Such a construction of the Theodore case is in accord with other decisions in the Southwest, both in the 9th Circuit Court and in the different States whose insurance laws are comparable with the insurance law of the State of Arizona.

Northwestern Life Insurance Co. vs. King, 53 Fed. 2d. 613;

Northwestern Mutual Life Insurance Co. vs. Wiggins, 15 Fed. 2d. 646;

First National Benefit Society vs. Fisk, 101 Pac. 2d. 205, 55 Ariz. 290;

Prudential Life Insurance Co. vs. Wynn, 71 Fed. 2d. 126.

In this case the policy in question was a so-called "business insurance policy" for a term of one year, transferrable at the end of that time to another form of policy subject to such conditions as the company might impose. This fact narrowed the health conditions to a more restricted sense, than in ordinary policies.

The Circuit Court of Appeals in deciding the instant case ignored this restricting condition entirely and ignored all evidence on the question of materiality that appeared in the record before it. In every decision of the 9th Circuit Court of Appeals and the States adjoin-

ing Arizona with comparable laws on insurance, it has been held over a period of years as shown by the cases cited, that the question of materiality in the representations in an application for insurance is a matter of fact for the jury. That issue was submitted by the Trial Court under proper instruction governing the Arizona rule on legal fraud and in setting the jury's verdict aside and entering judgment for the defendant company, respondent herein, the Circuit Court of Appeals ignored the law that has been built up through the years in Arizona and other states in the 9th Circuit of the United States Court.

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2. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION IN A MANNER THAT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AND THE STATE COURTS.

The Court of Appeals has reversed itself, and every other Circuit Court of Appeals that has ever had occasion to consider the question of the materiality of a false representation in an application for an insurance policy.

As heretofore shown, the rule in the 9th Circuit through a long series of cases had been that the question of materiality of a false representation is a question of fact for the jury, and its findings thereon will not be disturbed.

The various Circuit Courts in deciding this very question has followed the same rule:

Wharton vs. Aetna Life Insurance Co., 48 Fed. 2d 37, (Ark.);

Sentinel Life Insurance Co. vs. Blackmer, 77 Fed. 2d. 347 (Colo.);

Zolintakis vs. Equitable Life Insurance Co. of New York, 97 Fed. 2d. 583 (Utah);

Zogg vs. Bankers Life Insurance Company of Des Moines, 62 Fed. 2d. 575;

New York Life Insurance Company vs. Currier, 24 Fed. 2d. 1 (Penn.);

Northwestern Mutual Life Insurance Company vs. West, 68 Fed. 2d. 428 (D. C.);

McSweeney vs. Prudential Insurance Co., 128 Fed. 2d. 660 (Carolina);

Edwards et al vs. United States, 140 Fed. 2d. 526;

Equitable Life Insurance Company vs. Dunn, 64 Fed. 2d. 452;

Equitable Life Insurance Company of the United States vs. Alvarez, 141 Fed. 2d. 551.

All of the foregoing cases hold on circumstances much the same as obtained in the instant case that false representation or failure to disclose facts concerning the insured medical history and their materiality to the risk assumed by the insurance company are questions for the jury.

To make a false representation or the concealment of facts material as a matter of law regardless of the conditions surrounding the false representations or concealment is a doctrine that is directly contradictory to all of the adjudicated cases in the various Circuit Courts and the State Courts.

To say at this late date that a misstatement, or lapse of memory, or other excusable reason for, not stating certain facts appearing in an application for insurance voids the policy at the will of the insurance company is to ignore the decisions of all inferior federal courts, the decisions of the State Courts, and is directly contrary to the decisions of this court.

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3. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The court of appeals, as reflected from its opinion in this case, refused to consider Petitioner's right to have the record of the evidence upon which the verdict was rendered, considered in the light that "every reasonable intendment in favor of the verdict and judgment should be indulged in." In fact, it appears that there was no consideration given the petitioner in her appeal to the Court of Appeals. On the contrary it would appear from the opinion that the verdict in the lower court had gone against the petitioner (appellee) instead of Respondent, (appellant), and that the court apparently was reaching for all intendments which might favor Respondent (appellant).

It is the general rule of Circuit Courts of the United States that all intendments, inferences and assumptions in the evidence must be considered in light most favorable to the one in whose favor the verdict has been rendered; United States Fidelity & Guaranty Company v. Leong Dung Dey (9th Circuit), 52 F. 2d 567; Wharton v. Aetna Life Insurance Co., (8th Cir.), 48 F. 2d 37; Hardwood Lumber Co. v. Horton, 32 F. 2d 851; Public Utilities Co. v. McNaughton, 39 F. 2d

71; Lowden v. Burk, (8th Circuit), 129 F. 2d 767; Independent Exploration Co. v. Campbell, (7th Cir.), 127 F. 2d 898.

On questions of sufficiency of evidence to support verdict, Circuit Court of Appeals should not substitute its judgment for that of jury; Aetna Life Ins. Co. v. Newbern, 127 F. 2d 171; Equitable Life Insurance Co. of Iowa v. Halsey, (7th Cir.), 112 F. 2d 302; Mutual Life Ins. Co. of N. Y. v. Leob, (5th Cir.), 107 F. 2d 7; Aetna Life Ins. Co. v. McAdoo, (8th Cir.), 115 F. 2d 369.

WHERE jury resolves issues in favor of the plaintiff, reviewing court must accept testimony in plaintiff's favor as true and give plaintiff the benefit of such reasonable favorable inferences as may fairly be drawn therefrom; Colorado Life Ins. Co. v. Steele (8th Circuit), 101 F. 2d 448; Brush v. Prudential Life Ins. Co., of America, (3rd Circuit), 150 F. 2d 631; United States Fidelity & Guaranty Co. v. Wilson, 52 F. 2d 66; Ocean Accident & Guarantee Corp. v. Moore, 85 F. 2d 369; Fed. Savings & Loan Ins. Corp. v. First Nat. Bank of Liberty, Mo., (8th Cir.), 164 F. 2d 929; Hartford Accident and Indemnity Co. v. Jasper, (9th Circuit), 144 F. 2d 170; Helvering v. Johnson, 104 F. 2d 140; National Mutual Casualty Co. v. Eisenhower, (8th Cir.), 116 F. 2d 891; Huskey Refining Company v. Margaret R. Barnes et al, (9th Cir.), 119 F. 2d 715.

In view of the fact that burden was on Respondent to show that the applicant in the insurance policy made false statements of material facts, there is no foundation for the Circuit Court's reversal of the case, from the record.

The Court of Appeals erred in holding that Respondent had established a defense, under its amended affirmative answer, as a matter of law, and it was error of the gravest kind for the Court of Appeals to deny to petitioner the right to further hearing, in any event. The Court of Appeals should be directed to correct its error.

CONCLUSION.

For the reasons stated, it is respectfully submitted the petition for a writ of certiorari should be granted.

Dated, Phoenix, Arizona

February 17th, 1950.

Respectfully submitted,

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